WORKMEN'S COMPENSATION: Dissolution of insurer is not of itself such a default of insurer as to render employer primarily liable to injured employee, his dependents or other persons entitled to rights thereunder.

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August 23, 1947

Mr. Spencer H. Givens, Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter dated August 21, 1947, wherein you requested an opinion of this department relative to the liability of employers after the dissolution of their insurers. Said letter reads as follows:

"The recent dissolution of a compensation insurance carrier authorized to do business in Missouri has created legal and administrative problems on which we are seeking your advice in regard to the facts and questions stated below:

"On June 26, 1947, the Keystone Mutual Casualty Company of Pittsburgh, Pennsylvania, was dissolved by order and decree of the Court of Common Pleas of Dauphin County, Pennsylvania, and the Insurance Commissioner of the Commonwealth of Pennsylvania was directed to take possession of the property of said company and to liquidate its business and affairs.

"The Keystone Mutual Casualty Company began doing business in Missouri in 1943 and has written considerable business. At the present time there are a number of compensation cases, both adjudicated and unadjudicated, pending against this company.

"Our questions are these:

"In the light of the provisions of Section 3713, R. S. Mo., 1939, did employers insured by the Keystone Mutual Casualty Company for their Missouri compensation liability become primarily liable for the payment of unadjudicated claims as of June 26, 1947?

> "In claims already adjudicated but not yet paid out, on June 26, 1947, did employers insured by the Keystone Mutual Casualty Company for their Missouri compensation liability become primarily liable for the payment of the balance of compensation due?"

Section 3715, R.S. Mo. 1939, reads as follows:

> "If the employer be not insured his liability hereunder shall be primary and direct. If he is insured his liability shall be secondary and indirect, and his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder. On the request of the commission and at every hearing the employer shall produce and furnish it with a copy of his policy of insurance, and on demand the employer shall furnish the injured employee, or his dependents, with the correct name and address of his insurer, and his failure to do so shall be prima facie evidence of his failure to insure, but such presumption shall be conclusively rebutted by an entry of appearance of his insurer. Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer. Service on the employer shall be sufficient to give the commission jurisdiction over the person of both the employer and his insurer, and the appearance of the employer in any proceeding shall also constitute the appearance of his insurer, provided that after appearance by an insurer, such insurer shall be entitled to notice of all proceedings hereunder."

The Industrial Commission and the Division of Workmen's Compensation were created and are governed by statutory provisions, and consequently a careful analysis of these statutes is necessary to a proper determination of any question which may arise relating thereto. Kristanik v. Chevrolet Motor Company, 226 Mo. App. 89.

And, as has been repeatedly stated by the courts of this state, the Workmen's Compensation Act is to be interpreted, when possible, most favorably to the employee and his dependents. Decker v. Raymond Concrete Pile Company 336 Mo. 1116.

It is to be noted that Section 3715, R.S. Mo. 1939, supra, says:

> "* * * Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer.* * *" (Underscoring ours.)

Brashear v. Brand-Dunwoody Milling Company, 21 S.W. (2d) 191, involved a Workmen's Compensation case where the Commission gave an award of compensation against the employer but not against the insurer. The case reached the St. Louis Court of Appeals, and that court, in referring to the above quoted section of the statute, said at l.c. 193:

> "It is argued that the award of the commission against defendant, the insured, and not against the insurer, is void, because the award 'shall not be enforceable against the employer, except on motion and proof of default by the insurer.' Section 27 provides two situations in which the award may be against the employer primarily; i.e., if the employer be not insured, or upon motion and proof of default. It thus seems the commission has jurisdiction to make the award against the employer, if it finds, as a matter of fact, that either of those two conditions exists."

The court continued at l.c. 193:

> "The commission admittedly had jurisdiction of the parties and the subject-matter when it made its award. It further had the power to make the award primarily and directly against the employer. It is true it would have no such power, unless the employer was not properly insured, or in the event the insurance company failed to function. That,

> however, was a question of fact. We have no insurance policy or finding of facts before us for consideration, but, as before stated, only the record proper. Under that record, the judgment is regular and within the jurisdiction of the commission, as well as the circuit court."

The wording of that court indicates that, in accordance with the wording of Section 3715, R.S. Mo. 1939, supra, "on motion and proof of default by the insurer," the award of the Commission is enforceable against the employer. Upon such proof of default by the insurer, as regards the employee, the employer becomes primarily liable. In accordance with the spirit of the Workmen's Compensation Act, it is felt desirable that the employer either assure or insure the payment of any compensation that might be awarded. This is for the purpose of better protecting himself, as well as insuring payment to the employee or his dependents in case of injury. Section 3713, R. S. Mo. 1939, reads as follows:

> "Every employer electing to accept the provisions of this chapter, shall insure his entire liability thereunder except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer may himself carry the whole or any part of such liability without insurance upon satisfying the commission of his ability so to do. If the employer fail to comply with this section, and injured employee or his dependents may elect after the injury to recover from the employer as though he had rejected this chapter, or to recover under this chapter with the compensation payments commuted and immediately payable. If the employer be carrying his own insurance, on the application of any person entitled to compensation and on proof of default in the payment of any installment, the commission shall require the employer to furnish security for the payment of the compensation, and if not given, all other compensation shall be commuted and

> become immediately payable: Provided, that employers engaged in the mining business shall be required to insure only their liability hereunder to the extent of the equivalent of the maximum liability under this chapter for ten deaths in any one accident, but such employer may carry his own risk for any excess liability."

If, then, the employer becomes insured with an insurer who is subsequently dissolved, such dissolution would not of itself be sufficient proof of default by the insurer as to render the employer primarily liable, in accordance with the provisions of Section 3715, R.S. Mo. 1939, supra. It is conceivable that upon dissolution an insurance company could still pay an injured employee his claim in full, under the provisions of the Workmen's Compensation Act. If, however, at the hearing held on a claim against an employer and his insurer, where both are made a party to the hearing, it develops that the insurer is dissolved, and on motion the referee finds as a matter of fact that there is such an inability of the insurer to pay as to amount to a default of the insurer, such a finding would render the employer primarily liable both as to adjudicated and unadjudicated claims.

CONCLUSION

It is, therefore, the opinion of this department that, under the facts presented, on June 26, 1947, the employer did not become primarily liable merely because of the dissolution of the insurer. Both the employer and the insurer would be parties to the hearing on the award. If, at that hearing, on motion the referee finds that there was such an inability to pay by the insurer as to amount to a default by said insurer, such a finding would render the employer primarily liable to the employee, his dependents or other persons entitled to rights thereunder. Such primary liability would exist as to both adjudicated and unadjudicated claims.

Respectfully submitted,

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APPROVED:

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